Jurisdictional Statement

No. 81 5499

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

In the Matter of the Claim for Benefits under Article 18 of the Labor Law of New York State made by

IAN COHEN
Claimant-Appellant

NEW YORK CITY BOARD OF EDUCATION
Employer-Appellee

PHILIP ROSS, as Industrial Commissioner of the New York State Labor Dept.
Appellee

JURISDICTIONAL STATEMENT

IAN COHEN
484 W. 43 Street Apt 32G
New York, NY 10036
(212) 564-2789
Appellant, Pro Se

QUESTIONS PRESENTED

1. Whether pursuant to New York State Labor Law Section 591 (3) and its federal counterpart 26 U. S. C. § 3304 (a) (10), the Court of Appeals of New York State properly barred the now appellant-claimant from receiving unemployment insurance benefits for the months of July and August of 1979.

2. Whether a person, who is unemployed through no fault of his own can be barred from collecting unemployment insurance benefits if the unemployed person is eligible to receive a small and conditional payment from a previous employer.

3. Whether the period in question can be reasonably considered to be a paid vacation for claimant considering all the surrounding circumstances.

PARTIES BELOW

The individual claimant, Ian Cohen, is now the appellant.

The parties originally opposing appellant's claim were: Philip Ross, as Industrial Commissioner of New York State Department of Labor, and The New York City Board of Education, the former employer of the appellant. In the Court of Appeals of New York State only the New York City Board of Education opposed claimant's right to collect Unemployment Insurance Benefits.

OPINIONS BELOW

The opinions of the Administrative Law Judge and the Unemployment Insurance Appeal Board of the New York State Department of Labor are not reported. See Appendix A for copies of their decision. The opinion of the Appellate Division, Third Dept. of New York State is reported at 78 A. D 2d 734. The opinion of the Court of Appeals of the State of New York is reported at 54 NY 2d 659 Advance Sheet #192.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	i
Opinions Below	i
Table of Contents	ii
Table of Authorities	iii
Statement of Jurisdiction	1
Statutory Provisions	2
Statement of the Case	3
Summary of Argument	5
The Questions Are Substantial	6
Conclusion	7

Appendices

New York State Dept of Labor Administrative Law Judge's decision	A
New York State Dept of Labor Appeal Board Decision	A-1
NY State Appellate Division 3rd Dept Decision	B
New York State Court of Appeals Decision	C
Notice of Appeal	D
Relevant Statutes NY Labor Law 501 and 591 (3)	E

TABLE OF AUTHORITIES

Page

Statutes

Article VI, clause 2 U. S. Const. 2, 6

14th Amendment U. S. Const. 2

26 U. S. C. § 3304 (a) (10) ..... i, 1, 2, 5

28 U. S. C. § 1257 (2) 2

New York Labor Law Sections

501 6

591 (3) 1, 5

595 (1) 4

STATEMENT OF JURISDICTION

The claimant Ian Cohen appeals from the final decision of the New York State Court of Appeals dated June 29th, 1981 which foreclosed claimant from collecting unemployment insurance benefits for the months of July and August, 1979. Initially the claim for unemployment insurance benefits was made to the Industrial Commissioner of the New York State Department of Labor who rejected the claim based upon information supplied by a former employer (New York City Board of Education) of the claimant. An administrative hearing was held at an agency of the New York State Department of Labor presided over by an Administrative Law Judge. After the Administrative Law Judge decided that claimant was ineligible to receive unemployment insurance benefits, an appeal was taken to the Appeal Board of the New York State Department of Labor that affirmed the Administrative Law Judge's opinion. The claimant then appealed to the Appellate Division's Third Dept. of New York State that unanimously reversed the opinion of the Appeal Board and held that claimant was eligible to receive unemployment insurance benefits for the time period in question. The employer appealed to the New York State Court of Appeals which reversed the Appellate Division and reinstated the opinion of the Administrative Law Judge. In so doing, the Court held that <u>any</u> payment , <u>no matter how small</u>, could constitute disqualifying income that would bar a claimant from receiving any and all unemployment insurance benefits. It is this holding that claimant-appellant believes offends 26 U. S. C. § 3304 (a) (10). New York State Labor Law 591 (3) which considers vacation pay to be disqualifying income must have the approval of the Secretary of Labor (26 U. S. C. § 3304 (a)). New York State Labor Law 591 (3) considers vacation pay, even though such pay may actually fall within a period of layoff, disqualifying income. However, New York State's highest Court has handed down a <u>new</u> interpretation of section

591 (3) (b) that offends 26 U. S. C. § 3304 (a) (10), and according to Article 6, clause 2 of the U. S. Constitution , the federal law is supreme. This new interpretation denies claimant access to funds that were set aside by both the State of New York and the federal government to compensate unemployed persons, and in so doing violates the 14th Amendment to the U. S. Constitution. The jurisdiction of this Court is invoked under 28 U.S. C. § 1257 (2).

STATUTORY PROVISIONS

Article VI , clause 2 of the U. S. Constitution provides

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The 14th Amendment to the U. S. Constitution provides in Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 U. S. C. § 3304 (a) (10) provides

> (a) Requirements. --The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that--
>
> (10) compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income;

Section 501 of New York Labor Law - See Appendix at E

Section 591 (3) of New York Labor Law - See Appendix at E

Section 595 (1) of New York Labor Law provides

> No agreement by an employee to waive his rights under this article shall be valid.

STATEMENT OF THE CASE

Claimant became eligible to receive two lump sum payments , one in July, and the other in August, 1979, because he worked as an educational assistant for the New York City Board of Education from September 10th, 1978 until February 2nd, 1979. After a voluntary separation on February 2nd, 1979 claimant pursued other employment, and eventually was laid off from work for non-disqualifying reasons. On July 27th, 1979 claimant filed a claim for unemployment insurance benefits. After being told that benefits were being denied for the period of June 28th, 1979 until September 4th, 1979 because his former employer said he was on a paid vacation for that time period, claimant went to the offices of his former employer to seek out an explanation. He was told that he could receive two checks amounting to approximately $400 in gross income. However, before the checks would be disbursed, claimant had to sign an affidavit swearing that he did not apply for unemployment insurance benefits for the period in question, nor would he make a claim for such benefits. Claimant refused, and the checks were withheld.

An administrative hearing was held where testimony was taken and documents were submitted. Because of a negotiated contract between the United Federation of Teachers (claimant's former union) and the New York City Board of Education, claimant had accrued a five day paid vacation (since he worked about 5 months of the past school year) to commence at the conclusion of the school year in June. However because of an arbitration award that was signed July 12th, 1979 , claimant became eligible for two summer payments, even though his employment terminated 5 months earlier, computed using the number of hours claimant had worked during the past school year. If an employee worked the entire school year he would be entitled to a total summer payment

amounting to 5. 8 weeks pay at his former salary. Because claimant worked about half the school year he was eligible to receive approximately 2. 8 weeks of pay. However, he had to sign two documents in order to receive the summer payment; the waiver of unemployment insurance rights as discussed before, and a document whereby rights to join a public retirement system would be waived or in the event membership to a public retirement system was permitted by a court, the employee would then have to return the summer payment. The employer, fearing a huge financial liability if a court should hold employees eligible for benefits, (such was the result in the Appellate Division) succeeded in negotiating a clause in the arbitration award that transferred liability from the New York City Board of Education to the United Federation of Teachers; consequently in the Court below, the United Federation of Teachers submitted an amicus curae brief opposing benefits for their former member, Ian Cohen.

The Administrative Law Judge made a determination without considering arguments that claimant came within the purview of New York State Labor Law section 591 (3) without any further elaboration on that point. Claimant appealed to the administrative agency's Appeal Board urging that the $400 that had to covera 9 week period was not enough to live on and created an unjust enconomic cruelty ($44. per week). The decision to bar all unemployment insurance benefits was affirmed; however, the affidavit/waiver was held to violate section 595 (1) of New York Labor Law.

Appeal was then taken to the Appellate Division's Third Dept. conceding of course, that the 5 day vacation was disqualifying, but that the summer payment was not labeled a vacation , nor was it a real vacation, nor was the payment

offered comparable to the benefit rate that the New York State Department of Labor should have considered appropriate in claimant's economic situation. *

The Appellate Division unanimously reversed the Unemployment Insurance Appeal Board and ordered them to recompute benefits and re-determine eligibility, holding that the summer payment was not vacation pay , since it was not labeled as vacation pay, and was a fraction of the employee's former rate of pay.

The New York State Court of Appeals reversed the Appellate Division upon the appeal taken by the New York City Board of Education, and held that vacation pay could be a fraction of the employee's normal rate of pay as they interpreted NY Labor Law 591(3).

It should be noted that the employer in June, 1981 after the Appellate Division held employees to be eligible for benefits, and after the Appeal Board held the affidavit waiving rights to unemployment insurance to be violative of section 595 (1) of NY Labor Law, still required employees to sign the affidavit to receive the summer payment.

SUMMARY OF ARGUMENT

New York State's Labor Law Section 591 (3) conforms to 26 U. S. C. §3304(a)(10) There is no problem in considering vacation pay the equivalent of disqualifying income. Congress obviously did not intend for unemployed persons to have two reasonable sources of income. But, can disqualifying income mean in a reasonable sense that the receipt of $1.00 per week should bar a legitmately unemployed person from receiving any compensation from the New York State Department of Labor? Yet the New York Court of Appeals feels that the letter of the Labor Law must govern, and since the Law says "... a payment or allowance..." it can

*Claimant's benefit rate was later determined to be approximately $80 per week by the Industrial Commissioner

mean a fraction of the employees regular pay. In the present case the claimant is eligible to receive about $44 per week or 30% of his former salary. The next case could involve $34 or $24, etc. An employer, with the help of the New York State Court of Appeals, could succeed in destroying unemployed persons access to public funds , and thereby reduce the employer's contribution to the fund, by creating long , but poorly paid vacations. It is the interpretation by the New York Court of Appeals that offends Federal Law and according to article 6, clause 2 of the U. S. Constitution Federal Law is supreme.

THE QUESTIONS ARE SUBSTANTIAL

The Court should review this case because the intent of Congress is to provide legitimately unemployed persons with a reasonable income while seeking out new employment. New York State's highest Court has now created a precedent that can affect the well being and security of potentially every working man and woman in the State of New York. New York State recognized the importance of unemployed insurance in stating the public policy of New York in Labor Law section 501 "... Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state...." The Court of Appeals of New York State now permits an employer to make a miniscule payment, thus destroying the economic security that unemployment insurance was designed to cure.

CONCLUSION

For the reasons stated it is urged that the Court reverse the New York State Court of Appeals and order the lower Court to have benefits recomputed on a more equitable and reasonable basis.

Respectfully submitted,

9/25/81

IAN COHEN
484 W. 43 St. Apt 32G
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Appellant, Pro Se
(212) 564-2789

APPENDIX A

New York State Department of Labor
Administrative Law Judge Section

N.Y.C. Board of Education

DECISION

Name	SSA #	ALJ #	L.O. #
Esther Ganeles (Lead Case)	110-09-4210	79-42765	546
Lillian Wright	118-20-7788	79-41837	521
Viola Youngberg	099-18-2695	79-42022	519
Ian Cohen	055-46-3115	79-38597	511
Pia Gualandi	112-24-3698	79-38085	523
Marsha Richberg	120-34-5707	79-38132	561
Julia Irizarry	083-01-8188	79-38084	518
Ronald Coleman	051-36-4171	79-40119	520
Dorothy A. Farry	059-16-7154	79-37723	521
Roberta McEntee	081-18-1999	79-44069	546
Frieda A. Majewski	070-14-6316	79-41834	550
Frances Lipsig	114-07-1472	79-41468	519
Elton R. Kurzweh	129-28-5047	79-42535	68
Thedra McCrae	087-46-7531	79-42317	539

Decision mailed and duly filed in the Department of Labor on: NOV 5 - 1979

FINDINGS OF FACT: Combined hearings were held at which claimants EG, IC, PG, MR, RC and DF, representatives and counsel for the employer, a representative for claimant DF, a representative for claimant IC, counsel for claimant MR and a representative of the Industrial Commissioner appeared, and testimony was taken.

By initial determinations effective June 28 through September 4, 1979, claimants were ruled ineligible pursuant to Section 591 of the Unemployment Insurance Law because they were on paid vacations. Claimants PG, RC and DF were also charged with recoverable overpayments of $58, $25.50 and $62 respectively. At the hearing, the Industrial Commissioner made application to withdraw the initial determinations of ineligibility for the period from June 28 through September 4, 1979 as to claimants FM, FL and VY. By further initial determination effective August 22 through August 24, 1979, claimant VY was ruled ineligible because of unavailability for employment. Prior to the hearing, claimant VY made application to withdraw her request for a hearing on said initial determination.

Although duly notified, claimants JI, LW, EK, TM and RM failed to appear for the scheduled hearing.

Claimants EG, IC, PG, MR, RC and DF were employed as paraprofessionals or cafeteria workers by a municipal board of education, for varying periods during the 1978-79 school year, which ended on June 27, 1979. Thereafter, they became eligible for vacation pay covering the first ten days of the summer recess of the school system, commencing June 28. They were either members of unions in contractual relations with the employer, or included in collective bargaining units. Under the terms of a negotiated contract, all employees were entitled to vacation pay plus summer payments, which were reckoned on a basis proportionate to their employments during the academic year. In recognition of this provision of the collective bargaining agreement, they were each provided with affidavits waiving their rights to unemployment insurance benefits during the summer recess of the school system. Those who signed the waiver received the summer payments, including one or two who did so under protest. A failure to sign the waiver did not alter the option of receiving summer payments upon even belated signature. Claimants PG, RC and DF nevertheless received benefits for the period in issue totaling $58, $25.50 and $62 respectively to which they were not entitled.

OPINION: Section 591.3(b) states the following in pertinent part: "The term vacation period, as used in this subdivision, means the time designated for vacation purposes in accordance with the collective bargaining agreement or the employment contract or by the employer and the claimant, his union, or his representative. If

either the collective bargaining agreement or the employment contract is silent as to such time, or if there be no collective bargaining agreement or employment contract, then the time so designated in writing and announced to the employees in advance by the employer is to be considered such vacation period." The eligibility for benefits of claimants EG, IC, PG, MR, RC and DF come within the purview of the foregoing statute during the period in issue. The period in issue is a time designated for vacation purposes in accordance with the collective bargaining agreement in the instant case, as defined by the negotiations and an earlier arbitration award. Accordingly, said claimants were correctly ruled ineligible for the period in issue. Consequently, any payments received by claimants PG, RC and DF during, or for, the period in issue comprise overpayments. Said overpayments are recoverable because they are for periods during which they were entitled to vacation pay and/or its equivalent.

Inasmuch as no one will be prejudiced thereby, the Industrial Commissioner's application to withdraw the initial determinations as to claimants FM, FL and VY should be granted. Moreover, the application of claimant VY to withdraw her request for a hearing on the initial determination of unavailability should also be granted for the same reason.

DECISION: Based upon the testimony and the evidence, the initial determinations as to claimants JI, [illegible], EK, TM and FM are sustained. The initial determinations of ineligibility as to claimants FM, FL and VY are withdrawn pursuant to applications therefor. The initial determinations as to claimants EG, IC, PG, MR, RC and DF are sustained. Claimants PG, RC and DF were overpaid, and said overpayments are recoverable.

/s/ LEONARD J. RICHMAN
Administrative Law Judge

rak
10/31/79

New York State Department of Labor
Unemployment Insurance Appeal Board

DECISION

Re: Name	S.S. No.	ALJ. No.	Appeal Board No.
Esther Ganeles	110-09-4210	79-42765	301,211
Ian Cohen	055-46-3115	79-38597	300,634
Ronald H. Coleman	051-36-4171	79-40119	300,635

Decision mailed and duly filed in the Department of Labor on MAR 26 1980

PRESENT James R. Rhone, G. Douglas Pugh MEMBERS

Claimants E.G. and I.C. appeal from the decision of the Administrative Law Judge filed November 5, 1979 sustaining the initial determinations of the local offices holding them ineligible to receive benefits effective June 28 through September 4, 1979 because it was a paid vacation for which no benefits are payable. Claimant R.C. appeals from said decision of the judge sustaining the initial determinations of the local office holding him ineligible to receive benefits effective June 28 through September 4, 1979 because it was a paid vacation for which no benefits are payable and charging him with an overpayment of $25.50 in benefits, ruled to be recoverable.

Combined hearings were held before the Administrative Law Judge at which all parties were accorded a full opportunity to be heard and at which the claimants, other claimants not involved in these appeals, a representative for claimant I.C., representatives for other claimants not involved in these appeals, a representative of and witnesses for the employer, the employer's attorney, and a representative of the Industrial Commissioner appeared and testimony was taken. The Board considered the arguments contained in the written statements submitted by claimant E.G., by and on behalf of claimant I.C., and on behalf of the employer with respect to claimant I.C. on appeal.

After a review of the record including testimony and evidence adduced before the Administrative Law Judge and due deliberation having been had thereon, and having found that the Administrative Law Judge's findings of fact and opinion are fully supported by the record, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the opinion of the Administrative Law Judge as the findings of fact and opinion of the Board, except that our decision is not based on the fact that the summer payments were conditioned upon signing a waiver of rights to unemployment insurance benefits. Such a waiver would be invalid under Section 595 of the Labor Law.

DECISION: The decision of the Administrative Law Judge is affirmed.

JAMES R. RHONE, Member

G. DOUGLAS PUGH, Member

RC:WL

488 9445

Supreme Court—Appellate Division
Third Judicial Department

APPENDIX B

37998

October 16, 1980

In the Matter of the Claim of IAN COHEN,
Appellant.

NEW YORK CITY BOARD OF EDUCATION,
Respondent.

PHILIP ROSS, as Industrial Commissioner,
Respondent.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed March 26, 1980, which determined that claimant was ineligible to receive unemployment insurance benefits.

Claimant was employed as a paraprofessional for the New York City Board of Education (hereafter referred to as employer) until he resigned for personal reasons on February 2, 1979. He thereafter secured other employment from which he was laid off under non-disqualifying conditions on July 12, 1979. Claimant's application for benefits was subsequently denied by the board which held that claimant was on paid vacation from the employer from June 28 through September 4, 1979 and thus ineligible to receive benefits. This appeal ensued.

The collective bargaining agreement in effect for the period in issue establishes that paraprofessionals were hourly employees who were not assured of being rehired each fall. They were entitled to "vacation" payments in addition to "summer" payments. Vacations were defined to include the first 10 days following the close of the school year (June 28 through July 11, 1979) and were to be accrued at the rate of one day for each month or major portion thereof of service during the school year. Two summer payments were to be made, one in July and one in August, and represented fractional amounts of the paraprofessional's normal earnings. Summer payments were to be prorated based upon the number of days worked during the total school year and were contractually defined to cover the period between the third to last weekday in June and the Wednesday following Labor Day (June 28 through September 4, 1979).[1]

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1 It should be noted that the agreement sought to condition a paraprofessional's receipt of the summer payments upon execution of a waiver of rights to unemployment insurance benefits. Although the administrative law judge used this waiver to support his decision denying benefits, the board, in affirming the decision of the administrative law judge, specifically held that its determination was not based upon the waiver which it found to be invalid under section 595 of the Labor Law. The employer attempts to contest that portion of the board's decision on this appeal. However, the issue is not properly before us since the employer did not file a notice of appeal from the board's decision.

The board's determination must be reversed. While it is true that no benefits shall be payable to any claimant for any day during a paid vacation period (Labor Law, § 591, subd. 3, par. [a]), it is also true that the term "vacation period" means the time designated for vacation purposes in accordance with the applicable collective bargaining agreement (Labor Law, § 591, subd. 3, par. [b]). In the instant case, the negotiated contract contains separate definitions for "summer" and "vacation" periods. Although we recognize that the labels used in agreements are not conclusive (see Matter of Faccio [Catherwood], 37 A D 2d 633, affd. 31 N Y 2d 702; Matter of Walker [Catherwood], 28 A D 2d 256) and that determinations holding school employees ineligible when they have worked 10 months and been paid for 12 months have been upheld as rational (see, e.g., Matter of Wolfson [Ross], 57 A D 2d 10; Matter of Utter [Levine], 52 A D 2d 994), we cannot concur with the board's conclusion that the entire period from June 28 through September 4, 1979, was a paid vacation for claimant.

The summer payments, in addition to covering a period of time which included claimant's vacation period, were computed under a separate formula which did not fully compensate claimant at his prior rate of pay.[2] Therefore, we are led to the conclusion that, unlike the situations in Matter of Wolfson (Ross) (supra) and Matter of Utter (Levine) (supra), the amounts paid to claimant as summer payments represented previously earned moneys whose disbursement was deferred until July and August. Accordingly, since we find the board's determination arbitrary and unsupported by substantial evidence, it must be reversed.

Decision reversed, with costs, and matter remitted to the Unemployment Insurance Appeal Board for recomputation and further proceedings not inconsistent herewith.

MAHONEY, P. J., SWEENEY, STALEY, JR., CASEY and HERLIHY, JJ., concur.

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2 Had claimant not left the employer in February but stayed on until the end of the school year on June 27, he would have received approximately 5.8 weeks of salary for the 10 weeks covered by the summer payments.

State of New York
Court of Appeals

3 No. 371
In the Matter of Ian Cohen,
Respondent,
New York City Board of Education,
Appellant,
Philip Ross, as Industrial Commissioner,
Respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

(371)Allen G. Schwartz,NYC Corporation Counsel (Fay Leoussis,Leonard Koerner,& Carolyn E. Demarest of counsel) for appellant.
Ian Cohen,NY City, respondent pro se & Murray Shactman, NYC.

MEMORANDUM

The order of the Appellate Division should be reversed, without costs, and the decision of the Unemployment Insurance Appeal Board reinstated.

The Board's decision had a rational basis. What constitutes vacation pay is determined by the collective bargaining agreement. The fact that that agreement called for both "vacation pay" and "summer pay" and that the summer pay did not equal claimant's prior rate of pay could, considered alone, lead to the conclusion that the summer pay was deferred compensation. There are, however, counterbalancing factors which furnish a rational basis for the Board's holding. First, summer pay is paid for a period during which the employee is not working (i.e., during the school vacation period); the difference in appellations for the two categories of pay is essentially historical. Secondly, nothing in the negotiations for "summer pay" suggests that the negotiators intended it as deferred compensation.

To the contrary, the arbitration award which was part of the negotiating process expressly states that "employees shall not be entitled to receive unemployment insurance during the summer periods." Finally, Labor Law, Section 591 (subd 3) requires only that there be a "payment or allowance" not that it be computed in the same manner as regular pay, and expressly excludes as a determining factor the fact that "such payment or allowance be deemed to be remuneration for prior services rendered as an accrued contractual right."

* * * * * * * * * * * * * * * *

Order reversed, without costs, and the decision of the Unemployment Insurance Appeal Board reinstated in a memorandum. All concur.

Decided June 29, 1981

APPENDIX D

In the Court of Appeals of the
State of New York

In the Matter of the Claim for Benefits under
Article 18 of the Labor Law made by

IAN COHEN

Claimant-Appellant

NEW YORK CITY BOARD OF EDUCATION

Employer-Appellee

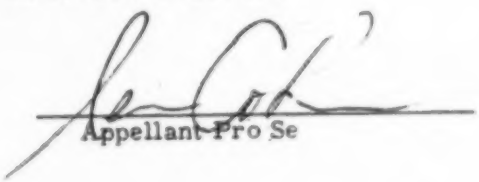
PHILIP ROSS, as Industrial Commissioner of the
New York State Labor Dept.

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Ian Cohen, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, reversing a decision to give benefits under Article 18 of the Labor Law of New York State, entered on June 29th, 1981. This appeal is taken from each and every part thereof.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).



Appellant Pro Se

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Kenneth Weinstein being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides in the County of New York.

That on the 24th day of September, 1981, deponent served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, pursuant to the Rules of the Supreme Court of the United States, as follows:

1. On the Clerk of the Court of Appeals, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to said Clerk at Eagle Street, Albany, New York, 12207

2. On the New York City Board of Education, by mailing a copy in a duly addressed envelope, with first class postage prepaid to

Allen G. Schwartz
Corporation Counsel for the City of NY
100 Church Street
New York, NY 10007
Att: Fay Leoussis

3. On the Industrial Commissioner of the NY State Labor Dept, and the State of New York, by mailing a copy in a duly addressed envelope, with first class postage prepaid to

Attorney General of the State of New York
2 World Trade Center
New York, NY 10047
Att: Room 7129, Frederick Paola

Kenneth M. Weinstein

Sworn to before me this
24th day of September, 1981

ARMPAV SHAOTMAN
Notary Public, State of New York
No. 31-4651730
Qualified in New York County
Commission Expires March 30, 19[illegible]

APPENDIX E

Section 501 of New York Labor Law

§ 501 Public policy of state

As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family. After searching examination of the effects of widespread unemployment within the state, the joint legislative committee on unemployment appointed pursuant to a joint resolution adopted April ninth, nineteen hundred thirty-one, reported to the legislature that "the problem of unemployment can better be met by the so-called compulsory unemployment insurance plan than it is now handled by the barren actualities of poor relief assistance backed by compulsory contribution through taxation. Once the facts are apprehended this conclusion is precipitated with the certainty of a chemical reaction." Taking into account the report of its own committee, together with facts tending to support it which are matters of common knowledge, the legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.

Added L.1944, c. 705, § 1.

RELEVANT STATUTE

LABOR LAW, Section 591(3):

3. Vacation period or holiday. (a) No benefits shall be payable to a claimant for any day during a paid vacation period, or for a paid holiday, nor shall any such day be considered a day of total unemployment under section five hundred twenty-two of this article.

(b) The term "vacation period", as used in this subdivision, means the time designated for vacation purposes in accordance with the collective bargaining agreement or the employment contract or by the employer and the claimant, his union, or his representative. If either the collective bargaining agreement or the employment contract is silent as to such time, or if there be no collective bargaining agreement or employment contract, then the time so designated in writing and announced to the employees in advance by the employer is to be considered such vacation period.

(c) A paid vacation period or a paid holiday is a vacation period or a holiday for which a claimant is given a payment or allowance not later than thirty days thereafter, directly by his employer or through a fund, trustee, custodian or like medium provided the amount thereof has been contributed solely by the employer on behalf of the claimant and the amount so contributed by the employer is paid over in full to the claimant without any deductions other than those required by law, even if such payment or allowance be deemed to be remuneration for prior services rendered as an accrued contractual right, and irrespective of whether the employment has or has not been terminated.

(d) Any agreement expressed or implied by a claimant or by his union or other representative to a plant or department shut down for vacation purposes is not of itself to be considered either a withdrawal by such employee from the labor market during the time of such vacation shut down or to render him unavailable for employment during the time of such vacation shut down.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

Docket No. 81-5499

In the Matter of the Claim for Benefits under Article 18 of the Labor Law made by

IAN COHEN,

Claimant-Appellant,

NEW YORK CITY BOARD OF EDUCATION,

Employer-Appellee,

PHILIP ROSS, as Industrial Commissioner of the New York State Department of Labor,

Appellee.

MOTION TO DISMISS OF EMPLOYER-APPELLEE

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TABLE OF CONTENTS

	Page
Statement.....	1
Questions Presented.....	2
Facts.....	2
Opinions Below.....	7
ARGUMENT	
THIS APPEAL SHOULD BE DISMISSED BECAUSE THE NEW YORK COURT OF APPEALS DID NOT RULE ON ANY CONSTITUTIONAL OR FEDERAL STATUTORY QUESTION, AND NO FEDERAL QUESTIONS WERE RAISED BELOW.....	10
Conclusion.....	13

TABLE OF AUTHORITIES

	Page
Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).....	11
Crowell v. Randell, 35 U.S. (10 Pet.) 368, 392-399 (1836).....	11
28 U.S.C. §1257.....	2, 11
26 U.S.C. §3304.....	11
New York Labor Law §591.....	3, 7, 8, 10, 11, 12
12 MOORE'S FED. PRAC. ¶¶505.01, 510.01 (2d ed. 1980).....	11

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

In the Matter of the Claim for Benefits under Article 18 of the Labor Law made by

IAN COHEN,

Claimant-Appellant,

NEW YORK CITY BOARD OF EDUCATION,

Employer-Appellee,

PHILIP ROSS, as Industrial Commissioner of the New York State Department of Labor,

Appellee.

MOTION TO DISMISS OF EMPLOYER-APPELLEE

Statement

The appellee New York City Board of Education moves to dismiss the appeal herein, from the order of the Court of Appeals of the State of New York entered June 29, 1981, on the grounds that the questions presented

either involve no constitutional or federal statutory questions or are raised for the first time on appeal to this Court.

Questions Presented

1. May jurisdiction be sustained under 28 U.S.C. §1257(2) where the state court has not reached any constitutional or federal statutory questions and has based its decision entirely on its interpretation of a state statute?

2. May an appellant raise for the first time on appeal to this Court an argument that a state labor law, as construed by the state administrative and judicial tribunals, is inconsistent with a federal tax statute?

Facts

(1)

Appellant, who is an actor, worked as a part-time educational assistant for employer-

appellee Board of Education of the City of New York [hereinafter, "appellee"] from 1975 through February 2, 1979, when he voluntarily severed his employment with appellee. While in his position as educational assistant, appellant was a member of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO ("UFT").

On July 27, 1979, appellant filed a claim for unemployment insurance benefits. On August 7, 1979, his claim was denied for the period between June 28 and September 4, 1979 because he was found to have been on a "paid vacation" from appellee.*

*Section 591(3) of the New York Labor Law precludes employees from receiving state unemployment insurance benefits during "paid vacation periods." "Paid vacation period" is defined as "the time designated for vacation purposes in accordance with the collective bargaining agreement" "for which a claimant is given a payment or allowance". N.Y. LAB. L. §591(3)(b)(c).

Appellant's entitlement to summer vacation pay from appellee for the Summer of 1979 came about as a result of collective bargaining negotiations between appellant's union and appellee. The contract contained a provision by which employees were entitled to up to ten days salary as vacation pay, to be paid for the first ten days after the close of the school year. Pursuant to this provision, the number of days of earned vacation pay was calculated at the rate of one day's pay for each month during which an employee worked for more than one-half the days thereof.

A subsequent separate Arbitration Award, to which appellant's union and appellee consented, also established a new "summer period", running from the end of the school year in June to the beginning of the new school year in early September, for which

additional, new vacation payments, entitled "summer payments", were granted. The amount of the additional summer payments was contingent upon the total number of hours worked.

These "summer" vacation payments, together with the vacation payments continued from the prior collective bargaining agreement, provide employees with up to a maximum of eight weeks pay for the newly-designated 10-week summer period.

Appellant was entitled to the 1979 summer payments in the summer of 1979 because of an informal agreement reached between appellee and appellant's collective bargaining representative in July 1979 to provide the summer payments to all employees who were in the City's employ subsequent to December 1, 1978. Appellant was also entitled to receive the vacation pay he

accrued under the prior formula for the summer of 1979.

(2)

Appellant appealed from the Industrial Commissioner's denial of benefits. Following a hearing, an administrative law judge, in a decision dated November 5, 1979, sustained the determination of the local office denying benefits. An appeal was then taken to the State Unemployment Insurance Appeal Board ("Appeal Board"). In a decision dated March 26, 1980, the Appeal Board affirmed the administrative law judge's decision. Appellant appealed the Appeal Board's decision to the Appellate Division, Third Department, which, in an order dated October 16, 1980, reversed the determinations below and remanded to the Appeal Board for a recomputation of benefits. Employer-appellee then appealed to the New York Court of Appeals which reversed the de-

cision of the Appellate Division and reinstated the determination of the Appeal Board. Appellant failed to raise the federal claim he has asserted on appeal to this Court in either the state administrative or judicial proceedings.

Opinions Below

New York Court of Appeals
54 NY 2d 659 (1981)

In a memorandum decision, the Court of Appeals reversed the Appellate Division, Third Department, and reinstated the decision of the Unemployment Insurance Appeal Board on the ground that it had a rational basis. In construing the applicable portions of Section 591 of the New York Labor Law, dealing with ineligibility for unemployment insurance benefits during a paid vacation period, the Court found that the statute provides that the terms of the collective

bargaining agreement govern what constitutes vacation pay and does not require the vacation pay to be computed in the same manner as regular pay.

Appellate Division
78 AD 2d 734

Relying upon the fact that the negotiated contract contains separate definitions for "summer" and "vacation" payments, the Appellate Division reversed the Appeal Board's determination, concluding that the newly-designated summer period in the collective bargaining agreement was not a vacation period within the meaning of Section 591(3)(b) of the New York Labor Law. While the Court acknowledged that labels alone are not conclusive, it reasoned that because the additional summer payments covered a period of time that included the days of vacation pay already provided for in the prior contract

and continued in the new one, and were computed under a formula which would not compensate an employee at full salary for the entire summer period, the summer payments were not vacation pay, as both the administrative law judge and Appeal Board had already determined, but actually "represented previously earned moneys whose disbursement was deferred until July and August".

Unemployment Insurance Board

The Unemployment Insurance Appeal Board affirmed, without opinion, the findings of fact and the opinion of the Administrative Law Judge.

Administrative Law Judge

The administrative law judge determined that the parties to the Collective Bargaining Agreements and Arbitration Award had estab-

lished a summer period, which was intended as a vacation period, and, as a result, persons covered by those agreements, such as appellant, were not entitled to benefits for that period pursuant to Section 591(3)(b) of the New York Labor Law. The judge concluded that because appellant was entitled to vacation pay during a designated vacation period, within the meaning of Section 591 (3)(b), the initial determination denying him benefits should be sustained.

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE NEW YORK COURT OF APPEALS DID NOT RULE ON ANY CONSTITUTIONAL OR FEDERAL STATUTORY QUESTION, AND NO FEDERAL QUESTIONS WERE RAISED BELOW.

Appellant has failed to establish a jurisdictional basis for his appeal. Appellant asserts jurisdiction pursuant to

28 U.S.C. §1257(2). However, the New York Court of Appeals was not presented with, nor did it reach, any questions of the constitutionality of Section 591 of the New York Labor Law or its validity under any laws of the United States.

On this appeal, appellant raises for the first time the argument that Section 591 of the New York Labor Law, as construed by the New York Court of Appeals, offends 26 U.S.C. §3304(a)(10), of the Internal Revenue Code. It is well-settled that in appeals from state courts, this Court is without jurisdiction to review federal claims that were never raised in the state court. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Crowell v. Randell, 35 U.S. (10 Pet.) 368, 392-399 (1836); 12 MOORE'S FEDERAL PRAC. ¶¶505.01, 510.01 (2d ed. 1980).

Additionally, since the issue was not heretofore raised, there is no factual basis in the record upon which to review the issue.

Moreover, since the cited statute expressly provides for initial review and approval by the Secretary of Labor, a step which has certainly not been taken subsequent to the New York Court of Appeals' recent construction of Labor Law §591 at issue here, any consideration of such issue by this Court at this time would be entirely speculative. There are clearly administrative remedies available to appellant which have not been exhausted and which are an essential prerequisite to the argument he raises.

Because the federal question raised in appellant's jurisdictional statement was never raised below and the New York Court of Appeals did not reach any federal ques-

tions but merely construed a provision of the New York Labor Law, appellant has failed to establish a jurisdictional basis for this appeal.

CONCLUSION

THE APPEAL HEREIN SHOULD BE DISMISSED, WITH COSTS.

Respectfully submitted,

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